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Branzburg, Who? The Existence of a Reporter's Privilege in Federal Courts

In 2003, President George W. Bush told the nation that Iraq had tried to buy uranium to make a nuclear weapon. Joseph Wilson, who had gone to Niger for the CIA in 2002 in order to investigate that claim, came forward shortly after the President's speech to announce that he had found no such information. Robert Novak, Judith Miller, and Matthew Cooper, all journalists, were then allegedly told that Wilson's wife, Valerie Plame, was a CIA operative. That information was published, thereby compromising her and rendering her unable to continue working undercover.

Federal prosecutor Patrick Fitzgerald was appointed to determine who had given Ms. Plame's name to the journalists, and whether that individual had committed a crime in doing so. He began a grand jury investigation into the matter and called the reporters as witnesses. Ms. Miller refused to reveal the name of her source, claiming the protection of a reporter's privilege to do so. The D.C. District Court found her in contempt and ordered her to jail until she revealed her source, or the grand jury term ended, whichever came first. The Court of Appeals for the District of Columbia Circuit affirmed the district court's decision, and the Supreme Court denied certiorari.

This comment asks the question, "Is there a federal common law reporter's privilege?" The Supreme Court has not addressed the issue since *Branzburg v. Hayes*¹ in 1972, prior to the enactment of the Federal Rules of Evidence. The *Branzburg* majority held that there was no absolute reporter's privilege available under the First Amendment to refuse to answer questions in a grand jury proceeding. The *Branzburg* opinion was signed by a majority, but federal courts since its release have spent considerable energy restricting its holding. This comment looks at the federal common law, including *Branzburg*, the Federal Rules of Evidence, the various views of the circuits, and state law to conclude that yes, reporters have a privilege to refuse to reveal their sources, but it is a

1. 408 U.S. 665 (1972).

qualified one that can be overcome in many circumstances by a strong showing of need by the party requesting the information.

IN THE BEGINNING . . .

The controversy over a reporter's right to refuse to name his sources dates to the Colonial times, when Benjamin Franklin's older brother was reportedly jailed for refusing to reveal his source.² The first reported federal case occurred in 1848, when a reporter was jailed for contempt of Senate for failing to disclose the name of a source who provided him with a copy of a secret draft of a Mexican-American War treaty.³ Another reporter was jailed in 1857 when he refused to reveal the names of House members who told him of bribe-taking colleagues.⁴ From that time until the Depression, there were various battles between the press and both the legislature and judiciary.⁵ During and after the Depression, journalistic sources became more widely sought-after, as stories of labor unrest and municipal corruption came out.⁶ Rather than reveal their sources, however, most reporters faced with demands for their sources chose to sit out their contempt sentences in jail.⁷ This "ritualistic jailing" of reporters brought about action by state legislatures, and nearly half the states had some form of shield law by 1973.⁸

BRANZBURG V. HAYES

The Supreme Court decided *Branzburg v. Hayes* in 1972.⁹ The case was actually four consolidated appeals, two from Kentucky,¹⁰ one from Massachusetts,¹¹ and one from California,¹² in which reporters were brought before grand juries to answer questions about, *inter alia*, the identity of hashish makers and the activities

2. James A. Drobile, Note, *The Journalist and His Confidential Informants - Should They Be Privileged from Compelled Disclosure*, 32 Temp. L.Q. 432 (1958-1959).

3. Ex Parte Nugent, 18 F. Cas. 471 (C.C.D.C. 1848).

4. 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5426, 715 (1980 & 2005 Supp.).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. 408 U.S. 665 (1972).

10. *Branzburg v. Hayes and Meigs*, 503 S.W.2d 748 (Ky. 1971); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky. 1970).

11. *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

12. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

and purposes of the Black Panthers.¹³ Justice White, writing for the majority, characterized the issue as “whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment.”¹⁴ The reporters argued that the free flow of information, protected by the First Amendment, would be harmed if they were forced to reveal sources to whom they had promised confidentiality, because those and other potential sources would be deterred from providing information in the future if they knew that the confidentiality they were promised was only illusory.¹⁵ The reporters proposed a balancing test, in which the burden on newsgathering would be weighed against the public interest in obtaining the confidential source.¹⁶

Justice White pointed out that the reporters were seeking an exemption from the ordinary duty of citizens to appear before a grand jury.¹⁷ In support of his position, he reviewed various permissible incidental burdens that result from requiring reporters to obey generally applicable laws.¹⁸ Justice White then traced the history of reporters’ claims for a First Amendment privilege, beginning with *Garland v. Torre*,¹⁹ in which the Second Circuit rejected a claim of a First Amendment privilege by a reporter in a civil case.²⁰ He found that courts had regularly applied a presumption against testimonial privileges and concluded that the burdens on the First Amendment were outweighed by the general obligation of citizens to give requested information in grand juries and trials.²¹ This balance, Justice White argued, was required by

13. *Branzburg*, 408 U.S. at 667-75.

14. *Id.* at 667. The First Amendment provides, in part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. CONST. amend. I.

15. *Branzburg*, 408 U.S. at 679-80.

16. *Id.* at 680. They argued that they should not be forced to testify at either a grand jury or a trial, unless tests were met: first, that there are sufficient grounds for believing that the reporter has relevant information; second, that the information is unavailable from other sources; and third, that the need for the information outweighs the First Amendment invasion. *Id.*

17. *Id.* at 682.

18. *Id.* at 683-86. The press is not free from the requirements of the National Labor Relations Act, the Fair Labor Standards Act, the Sherman Act, or non-discriminatory taxation. *Id.* at 683. Nor, Justice White continued, may it publish anything it wants. *Id.* The press may not publish knowing or reckless falsehoods, may be punished for contempt, and has no right to information greater than that of the public. *Id.* at 684. In addition, the press may be excluded from various government functions, crime scenes, and trials, in each case, so long as the public is also excluded. *Branzburg*, 408 U.S. at 684-85.

19. 259 F.2d 525 (2d Cir. 1958).

20. *Garland*, 259 F.2d at 545.

21. *Branzburg*, 408 U.S. at 686.

the constitutional nature of grand jury proceedings in determining probable cause and protecting citizens from unfounded prosecutions.²²

Justice White noted that only a handful of states had enacted a reporter's privilege at the time and that "the only testimonial privilege for unofficial witnesses" was the Fifth Amendment, and he declined to create a new privilege based on the First Amendment.²³ He argued that the desire of informants not to be revealed usually stemmed from a wish to either avoid prosecution or to avoid the entanglements of testifying as a witness, neither of which deserved First Amendment protection.²⁴ He also noted that the Court had insufficient evidence to determine what, if any, effect the denial of confidentiality might have on the willingness of informants to come forward.²⁵

In any event, Justice White reasoned, the claimed privilege would belong to the reporters, not the sources, and if the authorities were able to identify the source on their own, no privilege would exist to protect that source from testifying.²⁶ In addition, agreements to keep information secret were traditionally frowned upon, and to give such agreements First Amendment protection would denigrate that history.²⁷

Justice White briefly addressed the reporters' argument that the State be required to show a substantial relation between the sought information and a compelling interest in order to overcome the burden on First Amendment rights.²⁸ He looked at the interest of the government in the subjects of the cases before him and the likelihood that the reporters could provide relevant information, and determined that the interest in obtaining all relevant testimony in a grand jury proceeding outweighed the burden on the reporters' First Amendment rights.²⁹

22. *Id.* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V. "Infamous" crimes now include those punishable by death or imprisonment of more than one year at hard labor. FED. R. CRIM. P. 7(a).

23. *Branzburg*, 408 U.S. at 689-90.

24. *Id.* at 692-93.

25. *Id.* at 693. "We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will . . . be deterred by the prospect of dealing with those public authorities. . . ." *Id.* at 695.

26. *Id.* at 696.

27. *Id.* at 697.

28. *Branzburg*, 408 U.S. at 700.

29. *Id.* at 701.

Turning to practical considerations, Justice White noted the difficulties of administering a reporter's privilege.³⁰ He pointed out that Congress is able to determine if such a privilege is necessary or desirable, and has the ability to define its contours.³¹ In addition, he noted that the Attorney General had fashioned rules for press subpoenas.³² Finally, he reminded his readers of other protections available to the press: "grand jury investigations, if instituted or conducted in bad faith, would pose wholly different issues."³³ He concluded,

[W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like ordinary citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.³⁴

Justice Powell, though he signed the majority opinion, wrote a brief concurring opinion to, as he put it, "emphasize what seems to me to be the limited nature of the Court's holding."³⁵ He set out a balancing test, in which each claim of privilege would be judged on its own facts, against the common obligation of citizens to provide evidence.³⁶

Justice Stewart filed a dissenting opinion, joined by Justices Marshall and Brennan.³⁷ He believed that the First Amendment interest belonged to society as a whole, not just to the reporters or the sources,³⁸ and that the majority was allowing authorities to

30. *Id.* at 702-07.

31. *Id.* at 706.

32. *Id.* Attorney General Regulations, see 28 C.F.R. § 50.10. *Branzburg*, 408 U.S. at 706-07.

33. *Branzburg*, 408 U.S. at 707.

34. *Id.* at 690-91.

35. *Id.* at 709.

36. *Id.* at 710. "In short," he said, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.*

37. *Id.* at 725.

38. *Branzburg*, 408 U.S. at 726 (Stewart, J., dissenting). Justice Douglas also filed a dissenting opinion, in which he argued for an absolute reporter's privilege. *United States v. Caldwell*, 408 U.S. at 713 (Caldwell was one of the other reporters whose case was decided in *Branzburg*). In his dissent, Justice Douglas wrote, "My belief is that all the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment . . . advance[d] in this case." *Caldwell*, 408 U.S. at 713.

"annex" the press as an "investigative arm of the government."³⁹ He argued that, since the press has an obvious right to publish the news, it must also have the right to gather it, and that right necessarily implies the right to a confidential relationship between the reporter and his source.⁴⁰ Justice Stewart was concerned with the Court's demand for "scientific precision" in determining whether sources will be deterred from providing information.⁴¹

Instead, Justice Stewart set forth a threshold inquiry: whether there was a rational connection between the government's action and the impairment of First Amendment rights, and whether that effect would be more than *de minimus*.⁴² Then, he wrote, the Court should determine whether there was an unconstitutional infringement on First Amendment rights by balancing the competing interests.⁴³

Justice Stewart noted that the deterrent effect the lack of a privilege may have on the free flow of information, although not scientifically proven, was sufficiently established to warrant consideration.⁴⁴ He concluded that the loss of valuable information harms the public interest in its free flow.⁴⁵ Against this, he weighed society's interest in grand jury proceedings and noted that there were already several limits on that institution's ability to gather information, including common-law evidentiary privileges.⁴⁶

A balance of these interests, Justice Stewart said, demanded that the government show three things before requiring a reporter to reveal his source: (1) that the information sought is relevant to a "precisely defined subject of government inquiry;" (2) that there is a reasonable belief that the witness has the information; (3) and that there is no means less destructive of the First Amendment to obtain it.⁴⁷

39. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

40. *Id.* at 728. There are three factual predicates, Justice Stewart asserts, that lead to this proposition: first, that reporters require sources; second, that confidentiality is essential to the relationship between them; and third, that the subpoena power will either deter sources from providing information or reporters from printing it. *Id.*

41. *Id.* at 733. "We have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist." *Id.*

42. *Id.* at 733-34.

43. *Id.* at 734-35.

44. *Branzburg*, 408 U.S. at 735-36 (Stewart, J., dissenting).

45. *Id.* at 736.

46. *Id.* at 737.

47. *Id.* at 740.

THE POST-BRANZBURG PROCESS

Almost immediately after the Court's decision, federal courts started chipping away at its rule. Many federal courts interpreted *Branzburg* as establishing a qualified privilege for news reporters, and the Supreme Court has chosen not to directly address the issue in spite of numerous opportunities to do so.⁴⁸ When discussing *Branzburg* in the context of similar issues, the Court seems to interpret it as denying a privilege to reporters in both grand jury and criminal setting.⁴⁹ Generally, the federal circuits have limited *Branzburg* to the grand jury setting, and have used Justice Powell's concurring opinion to fashion a qualified privilege in both civil and criminal cases.⁵⁰ Other courts have simply chosen to ignore *Branzburg* and hold the existence of a First Amendment privilege in civil and criminal cases based on their own precedents.⁵¹ This section deals with the treatment the circuit courts have given the question of a reporter's privilege since *Branzburg*.

A party seeking discovery of confidential information in a civil case in the First Circuit must establish that its request is not frivolous.⁵² The circuit court has set forth a shifting burden of proof, first requiring the party seeking the information to show that it is relevant, then requiring the party asserting the privilege to show the need for confidentiality.⁵³ Thereafter, once both parties have met their burdens of proof, the reviewing court must de-

48. See, e.g., *LaRouche v. National Broadcasting Corp.*, 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986); *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 582 (1st Cir. 1980); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126; *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

49. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1990). See also *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 201 (1991).

50. *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). "The application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed. . . ." *Farr*, 522 F.2d at 468 (ultimately finding that the journalist's privilege was outweighed by the state trial court's power and duty to enter enforceable orders to protect the due process rights of the accused).

51. *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998). The court cited *Branzburg* in the next paragraph for the difficulties in determining who qualifies for the privilege. *Madden*, 151 F.3d at 128.

52. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). The party does this by showing that it can establish jury issues on the essential elements of its case, outside the contested discovery. *Bruno & Stillman*, 633 F.2d at 597.

53. *Bruno & Stillman*, 633 F.2d at 597. The Second Circuit considered the issue in the context of a defamation case, where the defendant was a media entity. *Id.*

cide the importance of confidentiality to the reporter's effectiveness.⁵⁴ In criminal cases, the First Circuit requires a balance between the press's interests in freedom from governmental intrusion and a criminal defendant's constitutional rights.⁵⁵ The court expressed concern about the "casual, if not cavalier" use of nonconfidential information in criminal proceedings, and indicated that nonconfidential information may be entitled to protection as well.⁵⁶ Recently, the First Circuit reaffirmed its version of the reporter's privilege.⁵⁷ First, like other circuits to consider the question, it determined that a reporter is entitled to the privilege when he intended, from the start, to disseminate his information to the public.⁵⁸ It then reiterated its burden-shifting test, after which the need for the information is weighed against the reporter's interest in confidentiality and the harm to the free flow of information.⁵⁹ The First Circuit has discussed a reporter's privilege in the context of a special proceeding, akin to a grand jury, but ultimately found that, regardless of any privilege, the information sought from the reporter was unquestionably relevant to a "good faith investigation," and that reasonable efforts were made to obtain the information from another source.⁶⁰

The Second Circuit also requires a balancing test in civil⁶¹ and criminal⁶² cases. In that circuit, courts are to demand that the party seeking confidential information show that the information is "highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other sources."⁶³ The test is the same in criminal matters, although a criminal defendant's evidentiary needs may weigh more heavily.⁶⁴ The Second Circuit has also upheld claims of privilege for nonconfidential

54. *Id.*

55. *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988).

56. *LaRouche*, 841 F.2d at 1182. The court ultimately concluded that the media's First Amendment interest was outweighed by the defendant's interests in obtaining the information. *Id.*

57. *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).

58. *Cusumano*, 162 F.3d at 714. The court applied the privilege to an academician gathering information for a study that would be transmitted to the public. *Id.*

59. *Id.* at 716.

60. *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004).

61. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). *See also In re Petroleum Products Anti-Trust Litigation*, 680 F.2d 5 (2d Cir. 1982).

62. *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), *cert. denied*, 464 U.S. 816 (1983).

63. *Burke*, 700 F.2d at 77 (citing *Baker*, 470 F.2d at 783-85; *Petroleum Products*, 680 F.2d at 7-8; *Zerilli*, 656 F.2d at 713-15; *Silkwood*, 563 F.2d at 438).

64. *Burke*, 700 F.2d 70, *cert. denied*, 464 U.S. 816 (1983).

information,⁶⁵ although the court applies a much more lenient test in that situation.⁶⁶ In order to determine whether the party claiming the privilege is entitled to it, the Second Circuit requires that the “the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process.”⁶⁷

Branzburg does not control in civil⁶⁸ or criminal⁶⁹ cases in the Third Circuit. In civil matters, that court has limited *Branzburg* to holding only that journalists have no *absolute* privilege to refuse to answer relevant questions in a grand jury setting, which was inapplicable in the civil setting.⁷⁰ Thus, the Third Circuit said, it was required to balance the First Amendment considerations against the need for evidence in the particular case.⁷¹ The party seeking the reporter’s evidence is required to show the “materiality, relevance, and necessity of the information,” as well as that there is no other source from which to obtain it.⁷² In criminal cases, the Third Circuit weighs the defendant’s interest in obtaining the information as one factor in deciding whether the reporter’s privilege is overcome.⁷³ The confidentiality of the information sought, while not irrelevant, is but one factor in the analysis.⁷⁴

65. *Id.* at 76.

66. *Gonzales v. National Broadcasting Corp., Inc.*, 194 F.3d 29, 36 (2d Cir. 1999) (“Where a civil litigant seeks nonconfidential information from a nonparty press entity. . . [he must show] that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.”).

67. *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987).

68. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979). The Third Circuit explained:

The strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources.

Riley, 612 F.2d at 715.

69. *United States v. Cuthbertson*, 630 F.3d 139 (3d Cir. 1980) (extending a qualified privilege to journalists not to disclose confidential sources or unpublished information in criminal cases).

70. *Riley*, 612 F.2d at 714. The court began by noting that Federal Rule of Evidence 501 does not set forth a specific privilege for reporters, but that it is clear from Congressional statements at the time that such a privilege was considered and not rejected by Congress. *Id.*

71. *Id.* at 716.

72. *Id.* See also *Silkwood*, 563 F.2d at 438 (holding that a trial court should consider four factors: the seeking party’s attempts to obtain the information from other sources, “whether the information goes to the heart of the matter,” the information’s relevance, and the type of controversy.).

73. *Cuthbertson*, 630 F.2d at 147.

74. *Id.*

In applying the privilege, the court looks to a fact-specific analysis to determine who qualifies for its protection: "[I]ndividuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the news-gathering process to disseminate the information to the public."⁷⁵

In *LaRouche v. National Broadcasting Company*,⁷⁶ the Fourth Circuit relied on a three-part test developed by the Fifth Circuit in *Miller v. Transamerican Press, Inc.*⁷⁷ which requires a determination of whether the information is relevant, whether it can be obtained by alternative means, and whether there is a compelling interest in it.⁷⁸ The Fourth Circuit applied this test in a civil defamation case and refused to compel disclosure of the confidential sources of NBC's allegedly defamatory story.⁷⁹ The court has declined to punish reporters for refusing to reveal nonconfidential information, at least where there were other sources of information available.⁸⁰ In criminal prosecutions, the Fourth Circuit read *Branzburg* to demand evidence of bad faith or governmental harassment before permitting any privilege in a criminal situation, at least when the information sought is not confidential.⁸¹

The Fifth Circuit split into the Fifth and Eleventh Circuits in 1981. Prior to that time, it set forth its *Miller* test, mentioned above, for civil cases. This test is now used in both circuits.⁸² The Fifth Circuit has characterized *Branzburg* as a "plurality opinion,"⁸³ and held that it does not protect confidential sources in civil cases.⁸⁴ Not surprisingly, it later held the same in criminal cases.⁸⁵

75. In re Madden, 151 F.3d 125, 130 (3d Cir. 1998).

76. 780 F.2d 1134 (4th Cir. 1986), *cert. denied*, 479 U.S. 818 (1986).

77. 621 F.2d 721, modified at 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

78. *LaRouche*, 780 F.2d at 1139 (citing *Miller*, 628 F.2d at 932).

79. *Id.* The court noted that LaRouche had not exhausted non-party depositions, nor demonstrated that he had tried unsuccessfully to obtain the information elsewhere. *Id.* In addition, the court noted that there were indications that LaRouche knew the names of the sources before the story was broadcast. *Id.*

80. *United States v. Steelhammer*, 539 F.2d 373, 375 (4th Cir. 1976). The court indicated, however, that its decision might be different if the reporters were the only source of the information. *Steelhammer*, 539 F.2d at 375.

81. In re Shain, 978 F.2d 850, 852 (4th Cir. 1992). "[A]bsent . . . bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." *Shain*, 978 F.2d at 852.

82. See, e.g., *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); In re Selcraig, 705 F.2d 789, 792 (5th Cir. 1983).

83. In re Selcraig, 705 F.2d at 792.

84. *Id.*

Although it has not specifically held that there is no privilege for confidential information in a criminal case, the court has indicated that it would not look favorably on such a claim.⁸⁶

The Sixth Circuit has declined to follow the example of other circuits, and strictly followed *Branzburg*'s admonition to disallow a reporter's privilege, at least in a grand jury or criminal setting.⁸⁷ Instead, courts in that circuit should

follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony, by determining whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, whether the grand jury's investigation is being conducted in good faith, whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.⁸⁸

The Sixth Circuit has not reached the question of a reporter's privilege in either a civil or criminal case, but has indicated that it would not look favorably on the claim.⁸⁹ However, at least one district court in that circuit has expressed the view that the weight of authority requires recognition of a qualified privilege in civil cases.⁹⁰ Other districts in the circuit have disagreed.⁹¹

The Seventh Circuit has only recently spoken on the issue of a reporter's privilege. *McKevitt v. Pallasch*⁹² did not decide the question, however, because "there [was] no conceivable interest in con-

85. *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998). "We conclude that news-reporters enjoy no qualified privilege not to disclose nonconfidential information in criminal cases." *Smith*, 135 F.3d at 972.

86. *Id.* at 971. "Short of . . . harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." *Id.*

87. *In re Grand Jury Proceedings*, 810 F.2d 580, 586 (6th Cir. 1987).

88. *Grand Jury Proceedings*, 810 F.2d at 586.

89. *Id.* at 585.

90. *Southwell v. S. Poverty Law Ctr.*, 949 F. Supp. 1303, 1312 (W.D. Mich. 1996) (Requiring a party seeking confidential information in a civil case to show that he has exhausted other avenues of gathering it, and that the information goes "to the heart of the matter," weighed against the harm that disclosure will cause).

91. *In re Daimler Chrysler AG Securities Litigation*, 216 F.R.D. 395 (E.D. Mich. 2003); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002).

92. 339 F.3d 530 (7th Cir. 2003).

fidentiality" in that case.⁹³ Language from the court's opinion, however, indicates that the court would not look favorably on a claim of privilege.⁹⁴

In 1972, the Eighth Circuit considered the question of a reporter's privilege in the context of a libel case.⁹⁵ Before the court reached the question of whether the confidential sources were privileged from discovery, however, it ruled that the plaintiff had failed to establish that the defendant-reporter had acted with knowing or reckless disregard of the truth.⁹⁶ Such an inquiry, the court said, had to be made to afford reporters the bare minimum of First Amendment protection.⁹⁷ Although other courts have interpreted this holding as creating a First Amendment privilege for reporters,⁹⁸ the Eighth Circuit regards the question as "an open one."⁹⁹

Branzburg, the Ninth Circuit said, reaches beyond the grand jury context, and requires that, in a criminal case, a judge balance the "claimed First Amendment privilege" against the "opposing need for disclosure" under the circumstances.¹⁰⁰ It later adopted the Second Circuit's test for determining who is eligible for the privilege.¹⁰¹ At the same time, it extended protection to nonconfidential information in a civil libel case.¹⁰² The first step in applying this privilege, the Ninth Circuit said, is to determine if the party seeking the information has made reasonable efforts to obtain it from other sources.¹⁰³ In a later proceeding in the same case,¹⁰⁴ the court set forth its full test for discovery of nonconfidential information held by a non-party in a civil case: first, the in-

93. *McKevitt*, 339 F.3d at 532.

94. *Id.* at 532-33. "The approaches that these decisions take to the issue of privilege can certainly be questioned." *Id.* at 532. "We do not see why there need to be special criteria merely because the possessor of documents or other evidence sought is a journalist." *Id.* at 533.

95. *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).

96. *Cervantes*, 464 F.2d at 992.

97. *Id.* at 993.

98. *Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) (hereinafter "Shoen I").

99. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 n.8 (8th Cir. 1997).

100. *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

101. *Shoen I*, 5 F.3d at 1293. "The purpose of the journalist's privilege . . . was . . . to protect the activity of 'investigative reporting,' regardless of the intended medium. *Id.* (citing *Von Bulow v. Von Bulow*, 811 F.2d 136, 142-44 (2d Cir. 1987)).

102. *Shoen I*, 5 F.3d at 1295. The court cautioned, however, that the lack of confidentiality may be considered as a factor in the analysis. *Id.*

103. *Id.* at 1296. The court indicated that the journalist must first invoke the privilege, and if he is able to do so, the burden shifts to the other party to overcome it. *Id.*

104. *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (hereinafter "Shoen II").

formation must be "unavailable despite exhaustion of all reasonable alternative sources;" second, the information is not cumulative; and third, it must be "clearly relevant to an important issue."¹⁰⁵

In the Tenth Circuit, reporters enjoy a qualified privilege against discovery in civil cases.¹⁰⁶ Although the court did not set out a factor test, it cited favorably to cases such as *Baker*¹⁰⁷ and *Cervantes*,¹⁰⁸ in which disclosure was denied.¹⁰⁹ The court later clarified its position, holding that *Silkwood*¹¹⁰ requires a court to consider the relevance and necessity of the information, the party's attempts to obtain the information elsewhere, and the nature of the information.¹¹¹ The Tenth Circuit has not decided the question of a privilege in the criminal context.

After the Fifth Circuit split into the Fifth and Eleventh Circuits, the Eleventh Circuit continued to follow *Miller* in civil cases.¹¹² In criminal matters, the court applies the same test, requiring the party requesting information to demonstrate that the information is "highly relevant, necessary to the proper presentation of the case, and unavailable from other sources."¹¹³

The District of Columbia Circuit has granted a qualified privilege to reporters in civil cases.¹¹⁴ *Branzburg*, the court reasoned, is not controlling in a civil context.¹¹⁵ The court stated that, ordinarily, a civil litigant's interest in the information would yield to the reporter's privilege.¹¹⁶ However, it cautioned, where the reporter is a party who would be shielded from liability by the privilege (as in

105. *Shoen II*, 48 F.3d at 416.

106. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

107. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

108. *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).

109. *Cervantes*, 464 F.2d at 438. The court remarked on various factors, including, *inter alia*, the relevance of the information sought, attempts to gain the information elsewhere, the type of case, and the vagueness of the demand. *Id.*

110. *Silkwood*, 563 F.2d 433.

111. *Grandbouche v. Clancy*, 825 F.2d 1463, 1466-67 (10th Cir. 1987). The Tenth Circuit required application of the *Silkwood* test to a claim that discovery requests from the defendant infringed on the plaintiff's First Amendment Right of Association, rather than his freedom of press rights. *Grandbouche*, 825 F.2d at 1467.

112. *Price v. Time*, 416 F.3d 1327, 1343-48 (11th Cir. 2005).

113. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1987).

114. *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1979). *See also* *Lee v. Dept. of Justice*, 413 F.3d 53, 58 (D.C. Cir. 2005) ("[W]e . . . held that despite *Branzburg* there is a reporter's privilege in civil actions . . .").

115. *Zerilli*, 656 F.2d at 711.

116. *Id.* at 712.

a libel case), the privilege should be accorded less weight.¹¹⁷ The court balanced the information's relevance: whether it goes to the heart of the matter, and whether the litigant has exhausted every other source in determining whether to compel disclosure of confidential sources.¹¹⁸ In a criminal context, the court has affirmed a district court's determination that requested testimony by reporters was not "essential and crucial," and thus that the reporters' privilege was not overcome.¹¹⁹

Recently, the D.C. Circuit considered a reporter's claim of privilege in circumstances factually indistinguishable from *Branzburg*.¹²⁰ The reporters in that case made two arguments relevant to this comment: first, that they were entitled to withhold their sources under the First Amendment; and second, that they were entitled to the same protection under the federal common law.¹²¹ The circuit court, after a lengthy discussion of *Branzburg*, found it to be controlling, and distinguished *Zerilli*¹²² as applicable only to civil cases.¹²³ The deciding judges disagreed on the resolution of the second question.¹²⁴ While all agreed that any privilege that might exist was overcome,¹²⁵ they expressed divergent views as to the nature of the privilege and whether it, in fact, existed.¹²⁶

As the foregoing demonstrates, most circuits recognize a First Amendment privilege for reporters in civil cases. Many others recognize such a privilege in criminal cases, while others found the differences between grand juries and criminal trials to be of no importance. *Branzburg* has been effectively limited to the grand jury setting. The courts have found their support for such a privilege in the First Amendment, despite the invitation of Federal Rule of Evidence 501 to create a privilege as "reason and experience" demand.

117. *Id.* at 714. See also *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 938 (1974) (The reporter's privilege was overcome by the plaintiff's need for the information when the defendant-reporter was claiming the privilege, and would be shielded from liability for an allegedly libelous story by enforcing it).

118. *Zerilli*, 656 F.2d at 713.

119. *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000).

120. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005) (hereinafter "Miller Subpoena").

121. *Miller Subpoena*, 397 F.3d at 967.

122. *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

123. *Zerilli*, 656 F.2d at 969-72.

124. *Id.* at 973.

125. *Id.*

126. *Id.* One argued that it should not be decided, one argued in favor of its existence, and one argued against it. *Id.*

FEDERAL RULE OF EVIDENCE 501:
THE CASE FOR A COMMON-LAW PRIVILEGE

Federal Rule of Evidence 501, enacted by Congress in 1974, provides, in pertinent part, that federal privileges are to be governed by "the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience."¹²⁷ The Advisory Committee decided to eliminate specific proposed privileges, which would have provided for, *inter alia*, attorney-client, psychotherapist-patient, and husband-wife privileges; instead, the committee decided that privileges would be recognized "based on a confidential relationship and other privileges should be determined on a case-by-case basis."¹²⁸ The rule applies the *Erie* doctrine,¹²⁹ so that in civil actions where state law provides the rule of decision, state privilege laws apply as well.¹³⁰

Rule 501 has been used to create, affirm, or deny other privileges over the years.¹³¹ The Supreme Court follows an analysis when deciding whether to recognize a privilege that allows it to consider various factors, including private interest, public interest, the weight of those interests against evidentiary benefits, and recognition of the privilege by federal and state governments.¹³²

Few courts have applied this analysis to a reporter's privilege. Judge Tatel, concurring in the D.C. Circuit in *Miller Subpoena*, argued that Rule 501 delegated the creation of a reporter's privilege to the courts.¹³³ Following the *Jaffe* framework, he noted the "chilling effects" that would occur from denial of the privilege, and the minor evidentiary benefit reaped from it.¹³⁴ The public harm, he said, would be "immense," in light of the large number of confidential source relationships used in journalism.¹³⁵ Judge Tatel found the lack of empirical support unconvincing, and he noted

127. FED. R. EVID. 501.

128. FED. R. EVID. 501 advisory committee's note.

129. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

130. FED. R. EVID. 501.

131. See, e.g., *Jaffe v. Redmond*, 518 U.S. 1 (1996) (absolute privilege for conversations in psychotherapist-patient relationship); *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990) (denying privilege to academic peer review materials); *Trammel v. United States*, 445 U.S. 40 (1980) (witness-spouse has a privilege not to testify adversely).

132. *Jaffe*, 518 U.S. at 10-13.

133. *Miller Subpoena*, 397 F.3d at 989 (Tatel, J., concurring).

134. *Id.* at 991.

135. *Id.*

that the Supreme Court has allowed other privileges based on nothing more than common sense.¹³⁶

Besides, for all the reasons that lead me to conclude that a privilege exists, reporters and their editors, attorneys, and sources probably believe the same, making it speculative indeed for the special counsel to suppose that dashing that expectation of confidentiality would have no effect on newsgathering.¹³⁷

Judge Tatel next reviewed treatment of the issue by the states, noting that there was undisputed evidence before him that "forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources."¹³⁸ He then noted that the clear weight of federal authority accepted some form of the privilege and that Department of Justice guidelines¹³⁹ protect media sources from compelled disclosure when it may impair their newsgathering.¹⁴⁰ *Branzburg*, he argued, did not foreclose his conclusion: in *Branzburg* the Court specifically noted that Congress had the power to create a reporter's privilege, and with the enactment of Rule 501, Congress, in turn, delegated the responsibility for that determination to the courts.¹⁴¹ In addition, "reason and experience" is different today than it was in 1972, and the question of a federal common law privilege should be considered accordingly.¹⁴²

At least one other court has applied the same analysis. In *New York Times Co. v. Gonzales*,¹⁴³ the Southern District of New York concluded, after a discussion of many of the cases above, that there is a common law reporter's privilege.¹⁴⁴ It noted the important private and public interests served by recognizing a reporter's privilege.¹⁴⁵ Confidential relationships, it said, have led to Watergate, investigations into organized crime and nuclear power

136. *Id.* at 992 (citing *Swindler & Berlin v. United States*, 524 U.S. 399 (1998); *Jaffe*, 518 U.S. at 10; *Trammel*, 445 U.S. at 44-45).

137. *Miller Subpoena*, 397 F.3d at 993 (Tatel, J., concurring).

138. *Id.*

139. 28 C.F.R. §50.10 (2003).

140. *Miller Subpoena*, 397 F.3d at 993 (Tatel, J., concurring).

141. *Id.* at 994.

142. *Id.*

143. 382 F. Supp. 2d 457 (S.D.N.Y. 1995).

144. *Gonzales*, 382 F. Supp. 2d at 495-96.

145. *Id.* at 497. The court noted that journalists rely heavily on confidential sources, which serves their private interests in securing information and effective newsgathering. *Id.* It also reasoned that the public interest, served by "full and unhampered reporting," is best served when reporters are not forced to reveal their sources. *Id.*

plants, Iran/Contra, the Monica Lewinsky scandal, and investigations into financial misconduct of elected officials.¹⁴⁶ Weighing the evidentiary benefits resulting from a rejection of the privilege, the district court found that, although the government received a benefit in that particular case, confidentiality is essential to many sources, who will refuse to come forward with their information if the government can override that promise.¹⁴⁷

Another factor recognized by the district court was the large number of states whose legislatures have fashioned a reporter's "shield law."¹⁴⁸ When *Branzburg* was decided in 1972, Justice White noted that only a handful of states had enacted such a statute.¹⁴⁹ Now, at least thirty-six states have adopted some form of reporter's privilege, either judicially or by the legislature.¹⁵⁰ The district court concluded that, based on the weight of authority, the privilege it recognized was qualified, rather than absolute.¹⁵¹

TODAY

The approach advocated by Judge Tatel in *Miller Subpoena* and the Southern District of New York in *Gonzales* seems to be the best approach to the question of a reporter's privilege. Beginning with the Watergate scandal of the 1970's, the press has increasingly relied on confidential sources for much of its information. Those sources will be less likely to speak if they know their conversations or identities may become public knowledge. If these sources refuse to divulge what they know, the public will suffer from the lack of knowledge of the information. While there are some situations in which such disclosure of a source's identity is a necessity, there are many more situations where it is not needed at all. A flexible approach, balancing competing needs of journalists and parties to litigation, or the government in criminal cases, would allow the courts to make a case-by-case determination of where the greater good lies. The fact that the privilege is qualified, rather than absolute, allows courts to consider many factors,

146. *Id.* at 498-99.

147. *Id.* at 500-01.

148. *Id.* at 502.

149. *Branzburg*, 418 U.S. at 689.

150. *Gonzales*, 382 F. Supp. 2d at 502 n.34. See also 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5426, n.96 (1980 & 2005 Supp.).

151. *Gonzales*, 382 F. Supp. 2d at 501.

including, as in *Miller Subpoena*, whether there were any laws broken when the source gave the reporter his information.

In *Branzburg*, Justice White expressed concern over the difficulties in administering a judicially-created privilege for reporters. However, the federal courts since then have proved his worry unfounded, easily determining who may claim the privilege by creating tests that are more flexible and workable than those created by the legislature. A statutory test is bound by the words used in the statute and often leaves out important categories of people, through deliberate omission or unworkable definitions. When courts are left to develop their own definitions of "reporter," they have the opportunity to consider more than a statutory list of people who are protected. This allows them to administer the privilege fairly, regardless of whether the person is a reporter, editor, journalist, blogger, anchor, or photographer.

Another important consideration is Federal Rule of Evidence 1101, which provides that Rule 501 is the only evidentiary rule applicable in grand juries. Because *Branzburg* only decided that there was no First Amendment privilege for reporters, there is still the possibility that the Supreme Court will someday decide that Rule 501 includes a reporter's privilege based on the confidential relationship rather than the Constitution. This privilege would then be applicable to grand juries through Rule 1101.

CONCLUSION

Over the last thirty years, courts have spent considerable time and energy distinguishing *Branzburg*. It seems a moot point now to argue that there is no reporter's privilege in the federal courts. Federal courts since *Branzburg* have carefully kept to its original holding in the grand jury setting, but they have taken the reins when the question of a privilege is raised in other contexts. The addition of Rule 501 tips the balance. The Supreme Court decided that there was no *First Amendment* privilege in grand juries, leaving a number of open questions for the lower courts to answer. In both civil and criminal contexts, the reporter's privilege is well established, perhaps not to the extent that the press would like, but to an extent that fairly balances the interests of the government, the people, and the press.

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